

if those 331 stations for which no revenue is listed are counted as small stations, there would be a total of 771 stations with an estimated revenue of \$10.5 million or less, representing approximately 68% of the 1141 full power commercial television stations listed in the BIA data base.

286. Alternatively, if we look at owners of commercial television stations as listed in the BIA database, there are a total of 488 owners. The database lists estimated revenues for 60% of these owners, or 295. Of these 295 owners, 156 or 53% had annual revenues of less than \$10.5 million. Using a worst case scenario, if the 193 owners for which revenue is not listed are assumed to be small, then small entities would constitute 72% of the total number of owners.

287. In summary, based on the foregoing worst case analysis using Bureau of the Census data, we estimate that our rules will apply to as many as 1150 commercial and noncommercial television stations (78% of all stations) that could be classified as small entities. Using a worst case analysis based on the data in the BIA data base, we estimate that as many as 771 commercial television stations (about 68% of all commercial television stations) could be classified as small entities. As we noted above, these estimates are based on a definition that we tentatively believe greatly overstates the number of television broadcasters that are small businesses. Further, it should be noted that under the SBA's definitions, revenues of affiliates that are not television stations should be aggregated with the television station revenues in determining whether a concern is small. The estimates overstate the number of small entities since the revenue figures on which they are based do not include or aggregate such revenues from nontelevision affiliated companies.

288. *Program Producers and Distributors:* The Commission has not developed a definition of small entities applicable to producers or distributors of television programs.⁸⁵¹ Therefore, we will utilize the SBA classifications of Motion Picture and Video Tape Production (SIC 7812),⁸⁵² Motion Picture and Video Tape Distribution (SIC 7822),⁸⁵³ and Theatrical Producers (Except Motion Pictures) and Miscellaneous Theatrical Services (SIC 7922).⁸⁵⁴ These SBA definitions provide that a small entity in the television programming industry is an entity with \$21.5 million or less in annual receipts for SIC 7812 and 7822, and \$5 million or less in annual receipts for SIC 7922.⁸⁵⁵ The 1992 Bureau of the Census data

⁸⁵¹ The term "television programs" is used in this context to include all video programming outlets, e.g., cable, DBS.

⁸⁵² "Establishments primarily engaged in the production of theatrical and nontheatrical motion pictures and video tapes for exhibition or sale, including educational, industrial, and religious films. Included in the industry are establishments engaged in both production and distribution. Producers of live radio and television programs are classified in Industry 7922." Standard Industrial Classification Manual, SIC 7812, Executive Office of the President, Office of Management and Budget (1987) (OMB SIC Manual).

⁸⁵³ "Establishments primarily engaged in the distribution (rental or sale) of theatrical and nontheatrical motion picture films or in the distribution of video tapes and disks, except to the general public." OMB SIC Manual, SIC 7822.

⁸⁵⁴ "Establishments primarily engaged in providing live theatrical presentations, such as road companies and summer theaters. . . . Also included in this industry are producers of . . . live television programs." OMB SIC Manual, SIC 7922.

⁸⁵⁵ 13 C.F.R. § 121.201.

indicate the following: (1) there were 7265 U.S. firms classified as Motion Picture and Video Production (SIC 7812), and that 6987 of these firms had \$16,999 million or less in annual receipts and 7002 of these firms had \$24,999 million or less in annual receipts;⁸⁵⁶ (2) there were 1139 U.S. firms classified as Motion Picture and Tape Distribution (SIC 7822), and that 1007 of these firms had \$16,999 million or less in annual receipts and 1013 of these firms had \$24,999 million or less in annual receipts;⁸⁵⁷ and (3) there were 5671 U.S. firms classified as Theatrical Producers and Services (SIC 7922), and that 5627 of these firms had less than \$5 million in annual receipts.⁸⁵⁸

289. Each of these SIC categories is very broad and includes firms that may be engaged in various industries including television. Specific figures are not available as to how many of these firms exclusively produce and/or distribute programming for television or how many are independently owned and operated. Consequently, we conclude that there are approximately 6987 small entities that produce and distribute taped television programs, 1013 small entities primarily engaged in the distribution of taped television programs, and 5627 small producers of live television programs that may be affected by the rules adopted in this *Report and Order*.

D. Description of Reporting, Recordkeeping and Other Compliance Requirements

290. We have not prescribed any reporting requirements. While several parties encouraged adoption of such requirements, we believe that our enforcement process alleviates the need for reporting. Thus, we will not impose recordkeeping requirements for video programming providers. Rather, we shall allow them to exercise their own discretion and only require that they retain records sufficient to demonstrate compliance with our rules (Section 79.1(g)(6)). In order to further relieve small video programming distributors of any unnecessary recordkeeping burden, we will permit video programming distributors to rely on certifications from the programming suppliers to demonstrate compliance with our closed captioning rules (Section 79.1(g)(6)).

E. Steps Taken to Minimize Significant Economic Impact On Small Entities and Significant Alternatives Considered

291. In formulating our closed captioning rules, we believe that we have minimized the effect on small entities while making video programming more accessible to persons with hearing disabilities.

⁸⁵⁶ U.S. Small Business Administration 1992 Economic Census Industry and Enterprise Report, Table 2D, SIC 7812, (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration) (SBA 1992 Census Report). The Census data do not include a category for \$21.5 million. Therefore, we have reported the closest increment below and above the \$21.5 million threshold. There is a difference of 15 firms between the \$16,999 and \$24,999 million annual receipt categories. It is possible that these 15 firms could have annual receipts of \$21.5 million or less and, therefore, would be classified as small businesses.

⁸⁵⁷ SBA 1992 Census Report, SIC 7812. The Census data does not include a category for \$21.5 million; therefore, we have reported the closest increment below and above the \$21.5 million benchmark. There is a difference of 6 firms between the \$16,999 and \$24,999 million annual receipt categories. It is possible that these 6 firms could have annual receipts of \$21.5 million or less and, therefore, would be classified as small businesses.

⁸⁵⁸ SBA 1992 Census Report, SIC 7922.

These efforts are consistent with the Congressional goal of increasing the availability of closed captioned programming while preserving the diversity of available programming.

292. Generally, we have not specifically exempted any class of video programming distributor because, we have determined that all video programming distributors are technically capable of delivering captioning. We have, however, recognized that ITFS licensees serve a particular well defined niche as distributors of specialized programming directed at specified sites and not generally intended for residential use. We also recognize that the general public benefits from the redistribution of this programming by MMDS operators. We have, therefore, determined that ITFS operators warrant a blanket exemption. Accordingly, we will exempt programming originated by ITFS licensees, regardless of the facility used to distribute this programming (Section 79.1(d)(7)).

293. We have also recognized the significance of locally produced and distributed programming of primarily local interest and limited repeat value. Much of this programming is produced on a low budget as a public service and our closed captioning requirements might impose a significant economic burden that could result in such programming not being televised. We have, therefore, created a limited exemption for such programming (Section 79.1(d)(8)).

294. We recognize that many new video programming services will often qualify as small entities. We also recognize the need to allow new and innovative services designed to serve emerging or niche markets greater flexibility than more established services serving well defined markets. Accordingly, we have created an exemption to relieve new services from our captioning rules for their first four years of operation (Section 79.1(d)(9)).

295. We will not require any video programming provider to spend more than 2% of its annual gross revenues received from a channel on closed captioning (Section 79.1(d)(11)). This will require video programming providers to devote a reasonable portion of their revenue stream to closed captioning. This mechanism will help to avoid an "all or nothing" approach thus ensuring that accessibility to captioned programming is increased without creating an economic burden on video programming providers.

296. Furthermore, we will exempt from our closed captioning requirements any video programming provider with less than \$3 million in annual gross revenues except that it will be required to pass through any captioning it may receive (Section 79.1(d)(12)). This provision is intended to address the problems of small video programming providers that are not in a position to devote significant resources towards captioning and who would, even if they expended 2% of their revenues on captioning, provide only a minimal amount of captioned programming. This will relieve the smallest of entities of any burdensome obligation to provide captioning without significantly reducing the availability of captioning.

297. In order to further minimize the impact of any unanticipated burdens that may be created by our closed captioning requirements, we have adopted a petition process that permits us to consider requests for individual exemptions from these rules based on the statutory undue burden standard (Section 79.1(f)). This mechanism will allow us to address the impact of these rules on individual entities and modify the rules to accommodate individual circumstances. We have specifically designed these procedures to ameliorate the impact of the closed captioning rules in a manner consistent with the objective of increasing the availability of captioned programming.

F. Report to Congress

298. The Commission will send a copy of the *Report and Order* including this FRFA in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of the *Report and Order* and this FRFA (or a copy thereof) will also be published in the Federal Register, *see* 5 U.S.C.

§ 608(b) and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

XI. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

299. The requirements adopted in this *Report and Order* have been analyzed with respect to the Paperwork Reduction Act of 1995 ("1995 Act") and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget ("OMB") as prescribed by the 1995 Act. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collections contained in the *Report and Order* as required by the 1995 Act. OMB comments are due 60 days from date of publication of the *Report and Order* in the Federal Register. Comments should address: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of information collected; and (4) ways to minimize the burden of collection of information on respondents, including the use of automated collection techniques or other forms of information technology.


300. Written comments by the public on the proposed and/or modified information collections are due on or before 30 days after publication of this *Report and Order* in the Federal Register. Written comments must be submitted by OMB on the proposed and/or modified information collections on or before 60 days after publication of this *Report and Order* in the Federal Register. A copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236, NEOB, 725-17th Street, N.W., Washington, D.C. 20502 or via the Internet to fain_t@al.eop.gov. For additional information concerning the information collections contained herein contact Judy Boley at 202-418-0214, or via the Internet at jboley@fcc.gov.

XII. ORDERING CLAUSES

301. Accordingly, IT IS ORDERED that, pursuant to authority found in Sections 4(i), 303(r), and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 613, the Commission's rules ARE HEREBY AMENDED by adding a new Part 79 as shown in Appendix B. The amendments set forth in Appendix B shall become effective January 1, 1998. Any information collection requirements shall be subject to approval by the Office of Management and Budget and be effective January 1, 1998.

302. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub.L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A

List of CommentersComments

1. ABC, Inc.
2. Access Fort Wayne ("Fort Wayne")
3. Access to Independence and Mobility ("AIM")
4. Access Television Network, Inc. ("Access Television")
5. A & E Television Networks, The History Channel, and Ovation ("A & E")
6. Alliance for Community Media ("Alliance")
7. Alphastar Television Network, Inc. ("Alphastar")
8. American Association of Advertising Agencies ("AAAA")
9. American Association of Community Colleges, Community College Satellite Network, America Indian Higher Education Consortium, George Washington University Television, Hispanic Education Telecommunications System, National Technological University, National University Telecommunications Network, Oklahoma State University, Institute for Telecommunications, Old Dominion University, and University of New Mexico ("Higher Education Parties")
10. American Athletic Association of the Deaf ("AAAD")
11. American Program Service, Connecticut Public Broadcasting, Inc., Detroit Educational Television Foundation, Greater New Orleans Educational Television Foundation, Louisiana Educational Television Authority, Maryland Public Broadcasting Commission, Metropolitan Board of Public Education, Mid-South Public Communications Foundation, Mississippi Authority for Educational Television, New Jersey Public Broadcasting Authority, Oregon Public Broadcasting, St. Lawrence Valley Educational Television Council, Inc., South Florida Public Telecommunications, Inc., South Texas Public Broadcasting System, University of New Hampshire, University of North Carolina Center for Public Television, Western New York Public Broadcasting Association, Window to the World Communications, Inc., and WQED Pittsburgh ("APS")
12. Ameritech New Media, Inc. ("Ameritech")
13. Archdiocese of Los Angeles Education and Welfare Corp., Diocese of Orange Education and Welfare Corporation, and Caritas Telecommunications, Inc. ("L.A. Archdiocese")
14. Arizona State Board of Regents for Benefit of the University of Arizona, Board of Regents of the University of Wisconsin System, California State University, Greater Dayton Public Television, Inc., KCTS Television, Northeastern Educational Television of Ohio, Inc., Oregon State System of Higher Education, Pasadena Unified School District, Regents of the University of Minnesota, St. Louis Regional Educational and Public Television Commission, San Diego County Superintendent of Schools, Santa Ana Unified School District, South Carolina Educational Television Commission, State of Wisconsin--Educational Communications Board, The Ohio State University, University of Maine System, University of Southern California, University of Wyoming, University System of the Ana G. Mendez Educational Foundation, WITF, Inc., and West Central Illinois Educational Telecommunications Corp. ("Arizona State Board")
15. Association of America's Public Television Stations and The Public Broadcasting Service ("APTS")

16. Association of Independent Video & Filmmakers ("AIVF")
17. Association of Late-Deafened Adults, Inc. ("ALDA")
18. Association of Local Television Stations, Inc. ("ALTV")
19. Bell Atlantic and NYNEX ("Bell Atlantic")
20. BellSouth Corporation, Bell South Interactive Media Services, Inc. and
BellSouth Wireless Cable, Inc. ("BellSouth")
21. Bloomberg Information Television ("BIT")
22. Californians for Television Access and Self Help for Hard of Hearing People - California
("California")
23. Captivision
24. Joan Cassidy ("Cassidy")
25. Catholic Television Network ("CTN")
26. CBS, Inc.
27. James J. Chladek, Cooperation TV Association of Southern Minnesota, Island
Broadcasting Co., Selective TV, Inc., Televue Systems of Minnesota, and UHF
Television, Inc. ("LPTV Licensees")
28. Chicago Access Corporation ("Chicago")
28. Cincinnati Community Video ("Cincinnati")
30. City of Kansas City, Missouri, Office of City Communications ("Kansas City")
31. City of Pittsburgh ("Pittsburgh")
32. City of Pocatello ("Pocatello")
33. Coalition of Protection and Advocacy Systems ("The Coalition")
34. Communications Services for the Deaf ("CSD")
35. Community Access Center ("CAC")
36. Community Access TV of Boulder, Inc. ("Boulder")
37. Community Broadcasters Association ("CBA")
38. Community Television Network - Ann Arbor, MI ("Ann Arbor")
39. Consumer Action Network ("CAN")
40. Leslie L. Cotter ("Cotter")
41. Cox Enterprises, Inc. ("Cox")
42. Dayton Access Television ("Dayton")
43. Direct Marketing Association, Inc. ("DMA")
44. DIRECTV, Inc. ("DirecTV")
45. E! Entertainment Television, Inc. ("E!")
46. Encore Media Corp. ("Encore")
47. Evanston Community Media Center ("Evanston")
48. Fox Sports NET, LLC ("Fox")
49. The Game Show Network, L.P. ("GSN")
50. Georgia Public Telecommunications Commission ("GPTC")
51. Greater Metro Telecommunications Consortium and The National Association of
Telecommunications Officers and Advisors ("GMTA")
52. Grupo Televisa, S.A. ("Televisa")
53. GTE Service Corp. ("GTE")
54. Ho'ike: Kauai Community Television, Inc. ("Kauai")
55. Home Box Office ("HBO")
56. HSN, Inc.
57. Indiana Higher Education Telecommunication System ("IHETS")

58. Intergovernmental Cable Communications Authority ("ICCA")
59. International Cable Channels Partnership, Ltd. ("ICCP")
60. International Computers
61. Japan Network Group, Inc. ("JNG")
62. Jerald M. Jordan ("Jordan")
63. Kaleidoscope Television ("Kaleidoscope")
64. KSLS, Inc. ("KSCI")
65. Lansing School District ("Lansing")
66. League of the Hard of Hearing ("LHH")
67. Lincoln Park Cable Commission ("Lincoln Park")
68. Lincoln Broadcasting Company ("Lincoln Broadcasting")
69. Massachusetts Assistive Technology Partnership ("MATP")
70. Media Captioning Services ("MCS")
71. Motion Picture Association of America, Inc. ("MPAA")
72. National Association of Broadcasters ("NAB")
73. National Association of the Deaf ("NAD")
74. National Association of Collegiate Directors of Athletics ("NACDA")
75. National Broadcasting Company, Inc. ("NBC")
76. National Cable Satellite Corporation ("C-SPAN")
77. National Cable Television Association ("NCTA")
78. National Captioning Institute ("NCI")
79. National Collegiate Athletic Association ("NCAA")
80. National Council on Disability ("NCD")
81. NIMA International ("NIMA")
82. Northern Virginia Resource Center for Deaf and Hard of Hearing Persons ("NVRC")
83. Ohio Educational Telecommunications ("OET")
84. Outdoor Life Network, Speedvision Network, The Golf Channel, BET on Jazz, and America's Health Network ("Outdoor Life")
85. Pace Telecommunications Center ("Pace")
86. Pacific 10 Conference ("Pac-10")
87. Para Technologies, Inc.
88. Paxson Communications Corp. ("Paxson")
89. Pay-Per-View-Network, Inc. d/b/a Viewers Choice ("Viewer's Choice")
90. Plymouth Community Channel 3 ("Plymouth")
91. Prevue Networks, Inc. ("Prevue")
92. Primestar Partners, L.P. ("Primestar")
93. Public Access Corporation of the District of Columbia and the District of Columbia Office of Cable Television ("District of Columbia")
94. Pulitzer Broadcasting Company ("Pulitzer")
95. QVC, Inc.
96. Radio-Television News Directors Association ("RTNDA")
97. Recording Industry Association of America ("RIAA")
98. Roman Catholic Diocese of Rockville Centre d/b/a Telicare ("Telicare")
99. Satellite Broadcasting and Communications Association of America ("SBCA")
100. Satellite Distributors Cooperative ("SDC")
101. SBC Communications, Inc., Southwestern Bell Video Services, Inc., and Southwestern Bell Media Ventures, Inc. ("SBC")

102. Self Help for Hard of Hearing People, Inc. ("SHHH")
103. SHHH Nova West ("Nova West")
104. Sierra Nevada Community Access Television ("SNCT")
105. Southwest Suburban Cable Commission ("Southwest Suburban")
106. Southwestern Oakland Cable Commission ("Southwestern Oakland")
107. Telemundo Group, Inc. ("Telemundo")
108. Television Food Network ("TVFN")
109. Three Angels Broadcasting Network, Inc. ("Three Angels")
110. Time Warner Cable ("Time Warner")
111. Tualatin Valley Community Access ("Tualatin")
112. United Video Satellite Group, Inc. ("United Video")
113. United States Satellite Broadcasting Company, Inc. ("USSB")
114. Univision Communications, Inc. ("Univision")
115. U S West, Inc. ("US West")
116. VITAC
117. The Weather Channel
118. Westsound Community Access Television, Inc. ("Westsound")
119. WGBH Educational Foundation ("WGBH")
120. Wireless Cable Association International Inc. ("WCA")

Reply Comments

1. A & E Network, The History Channel, and Ovation ("A & E")
2. ALLNEWSCO, Inc. d/b/a NEWSCHANNEL 8 ("Allnewsco")
3. American Athletic Association of the Deaf, Inc. ("AAAD")
4. Ameritech New Media, Inc ("Ameritech")
5. Ball State University ("Ball State")
6. Bell Atlantic and NYNEX ("Bell Atlantic")
7. BellSouth Corporation, BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. ("BellSouth")
8. BET Holdings, Inc. ("BET Holdings")
9. Bloomberg Information Television ("BIT")
10. The California Channel
11. Catholic Television Network ("CTN")
12. City of Sterling Heights, Sterling Heights Television Network ("Sterling Heights")
13. City of Indianapolis, Cable Communications Agency ("Indianapolis")
14. Community Television of Prince George's ("Prince George's")
15. Consumer Action Network ("CAN")
16. The Council of Organizational Representatives on National Issues Concerning People Who Are Deaf or hard of Hearing ("Council of Organizational Representatives")
17. Encore Media Corp. ("Encore")
18. Eternal Word Television Network ("EWTN")
19. Fox Sports Net, L.L.C. ("Fox")
20. The Game Show Network, L.P. ("GSN")
21. Greene Communications, Inc. ("Greene")
22. Grupo Televisa, S.A. ("Televisa")
23. Hear Ink Video Captioning ("Hear Ink")

24. Home Box Office ("HBO")
25. HSN, Inc.
26. Illinois Institute of Technology, Northeastern University, and The Board of Directors of the Leland Stanford Junior University ("Illinois Institute")
27. International Cable Channels Partnership, Ltd. ("ICCP")
28. International Computers
29. Kansas Association of the Deaf ("KAD")
30. Lansing School District ("Lansing")
31. Lifetime Television ("Lifetime")
32. Lincoln Broadcasting Company ("Lincoln")
33. Madison City Channel ("Madison")
34. Media Captioning Services ("MCS")
35. Motion Picture Association of America, Inc. ("MPAA")
36. National Association of Collegiate Directors of Athletics ("NACDA")
37. National Association of Broadcasters ("NAB")
38. National Association of the Deaf ("NAD")
39. National Cable Television Association ("NCTA")
40. National Captioning Institute ("NCI")
41. National Cable Satellite Corporation ("C-SPAN")
42. New England Cable News ("NECN")
43. New England College of Optometry (New England College")
44. Newhouse Broadcasting Corp. d/b/a Advance Entertainment Corp. ("AEC")
45. NIMA International ("NIMA")
46. Paxson Communications Corp. ("Paxson")
47. Pennsylvania Cable Network ("PCN")
48. Pennsylvania Cable & Telecommunications Association ("PCTA")
49. Primestar Partners L.P. ("Primestar")
50. QVC, Inc. ("QVC")
51. Radio-Television News Directors Association ("RTNDA")
52. Rainbow Programming Holdings, Inc. ("Rainbow")
53. The Small Cable Business Association ("SCBA")
54. Solon Community Television ("Solon")
55. Sonny Access Consulting ("Sonny")
56. Stavros Center for Independent Living, Inc. ("Stavros")
57. Tele-Communications, Inc. ("TCI")
58. Telemundo Group, Inc. ("Telemundo")
59. Neil Thompson and Thomas D'Angelo ("Thompson and D'Angelo")
60. Three Angeles Broadcasting Network, Inc. ("Three Angels")
61. Time Warner Cable ("Time Warner")
62. United States Satellite Broadcasting Company, Inc. ("USSB")
63. ValueVision International ("ValueVision")
64. Viacom Inc.
65. The Weather Channel
66. Wireless Cable Association International, Inc. ("WCA")
67. W.T. Woodson High School ("Woodson")

APPENDIX BRules

Title 47 of the Code of Federal Regulations is amended by adding a new Part 79 to read as follows:

1. The authority citation for Part 79 is added to read as follows:

AUTHORITY: 47 U.S.C. 613.

2. A new Section 79.1 is added to read as follows:

PART 79--CLOSED CAPTIONING OF VIDEO PROGRAMMING**Sec.**

79.1 Closed captioning of video programming.

Part 79 Closed captioning of video programming.

Section 79.1 Closed captioning of video programming.

(a) Definitions. For purposes of this section the following definitions shall apply:

(1) Video programming. Programming provided by, or generally considered comparable to programming provided by, a television broadcast station that is distributed and exhibited for residential use. Video programming includes advertisements of more than five minutes in duration but does not include advertisements of five minutes' duration or less.

(2) Video programming distributor. Any television broadcast station licensed by the Commission and any multichannel video programming distributor as defined in § 76.1000(e) of this chapter, and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission. An entity contracting for program distribution over a video programming distributor that is itself exempt from captioning that programming pursuant to paragraph (e)(9) of this section shall itself be treated as a video programming distributor for purposes of this section. To the extent such video programming is not otherwise exempt from captioning, the entity that contracts for its distribution shall be required to comply with the closed captioning requirements of this section.

(3) Video programming provider. Any video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to broadcast or nonbroadcast television network and the owners of such programming.

(4) Closed captioning. The visual display of the audio portion of video programming contained in line 21 of the vertical blanking interval (VBI) pursuant to the technical specifications set forth in § 15.119 of this chapter or the equivalent thereof.

(5) New programming. Video programming that is first published or exhibited on or after January 1, 1998.

(6) Pre-rule programming.

(i) Video programming that was first published or exhibited before January 1, 1998.

(ii) Video programming first published or exhibited for display on television receivers equipped for display of digital transmissions or formatted for such transmission and exhibition prior to the date on which such television receivers must, by Commission rule, be equipped with built-in decoder circuitry designed to display closed-captioned digital television transmissions.

(7) Nonexempt programming. Video programming that is not exempt under paragraph (d) of this section and, accordingly, is subject to closed captioning requirements set forth in this section.

(b) Requirements for Closed Captioning of Video Programming.

(1) Requirements for new programming. Video programming distributors must provide closed captioning for nonexempt video programming that is being distributed and exhibited on each channel during each calendar quarter in accordance with the following requirements:

(i) Between January 1, 2000, and December 31, 2001, video programming distributors shall provide at least 450 hours of captioned video programming, or if the video programming distributor provides less than 450 hours of new nonexempt video programming, then 95% of its new nonexempt video programming must be provided with captions;

(ii) Between January 1, 2002, and December 31, 2003, video programming distributors shall provide at least 900 hours of captioned video programming, or if the video programming distributor provides less than 900 hours of new nonexempt video programming, then 95% of its new nonexempt video programming must be provided with captions;

(iii) Between January 1, 2004, and December 31, 2005, video programming distributors shall provide at least an average of 1350 hours of captioned video programming, or if the video programming distributor provides less than 1350 hours of new nonexempt video programming, then 95% of its new nonexempt video programming must be provided with captions; and

(iv) As of January 1, 2006, and thereafter, 95% of the programming distributor's new nonexempt video programming must be provided with captions.

(2) Requirements for pre-rule programming. As of January 1, 2008, and thereafter, 75% of the programming distributor's pre-rule nonexempt video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(3) Video programming distributors shall continue to provide captioned video programming at substantially the same level as the average level of captioning that they provided during the first 6 months of 1997 even if that amount of captioning exceeds the requirements otherwise set forth in this section.

(c) Obligation to Pass Through Captions of Already Captioned Programs. All video programming distributors shall deliver all programming received from the video programming owner or other origination source containing closed captioning to receiving television households with the original closed captioning data intact in a format that can be recovered and displayed by decoders meeting the standards of § 15.119 of this chapter unless such programming is recaptioned or the captions are reformatted by the programming distributor.

(d) Exempt Programs and Providers. For purposes of determining compliance with this section, any video programming or video programming provider that meets one or more of the following criteria shall be exempt to the extent specified in this paragraph.

(1) Programming Subject to Contractual Captioning Restrictions. Video programming that is subject to a contract in effect on or before February 8, 1996, but not any extension or renewal of such contract, for which an obligation to provide closed captioning would constitute a breach of contract.

(2) Video Programming or Video Programming Provider For Which the Captioning Requirement has been Waived. Any video programming or video programming provider for which the Commission has determined that a requirement for closed captioning imposes an undue burden on the basis of a petition for exemption filed in accordance with the procedures specified in paragraph (f) of this section.

(3) Non-English Language Programming. All programming for which the audio is in a language other than English, except that scripted programming that can be captioned using the "electronic news room" technique is not exempt.

(4) Primarily Textual Programming. Video programming or portions of video programming for which the content of the soundtrack is displayed visually through text or graphics (e.g., program schedule channels or community bulletin boards).

(5) Programming Distributed in the Late Night Hours. Programming that is being distributed to residential households between 2 a.m. and 6 a.m. local time. Video programming distributors providing a channel that consists of a service that is distributed and exhibited for viewing in more than a single time zone shall be exempt from closed captioning that service for any continuous 4 hour time period they may select, commencing not earlier than 12 a.m. local time and ending not later than 7 a.m. local time in any location where that service is intended for viewing. This exemption is to be determined based on the primary reception locations and remains applicable even if the transmission is accessible and distributed or exhibited in other time zones on a secondary basis. Video programming distributors providing service outside of the 48 contiguous states may treat as exempt programming that is exempt under this paragraph when distributed in the contiguous states.

(6) Interstitials, Promotional Announcements and Public Service Announcements. Interstitial material, promotional announcements, and public service announcements that are 10 minutes or less in duration.

(7) ITFS Programming. Video programming produced for the instructional television fixed service (ITFS).

(8) Locally Produced and Distributed Non-News Programming With Limited Repeat Value. Programming that is locally produced by the video programming distributor, has no repeat value, is of

local public interest, is not news programming, and for which the "electronic news room" technique of captioning is unavailable.

(9) Programming on New Networks. Programming on a video programming network for the first four years after it begins operation.

(10) Primarily Non-vocal Musical Programming. Programming that consists primarily of non-vocal music.

(11) Captioning Expense in Excess of 2% of Gross Revenues. No video programming provider shall be required to expend any money to caption any video programming if such expenditure would exceed 2% of the gross revenues received from that channel during the previous calendar year.

(12) Channels Producing Revenues of Under \$3,000,000. No video programming provider shall be required to expend any money to caption any channel of video programming producing annual gross revenues of less than \$3,000,000 during the previous calendar year other than the obligation to pass through video programming already captioned when received pursuant to paragraph (c) of this section.

(e) Responsibility for and Determination of Compliance.

(1) Compliance shall be calculated on a per channel, calendar quarter basis;

(2) Open captioning or subtitles in the language of the target audience may be used in lieu of closed captioning;

(3) Live programming or repeats of programming originally transmitted live that are captioned using the so-called "electronic news room" technique will be considered captioned. The live portions of noncommercial broadcasters' fundraising activities that use automated software to create a continuous captioned message will be considered captioned;

(4) Compliance will be required with respect to the type of video programming generally distributed to residential households. Programming produced solely for closed circuit or private distribution is not covered by these rules;

(5) Video programming that is exempt pursuant to paragraph (d) of this section that contains captions, except video programming exempt pursuant to paragraph (d)(5) (late night hours exemption) of this section, can count towards the compliance with the requirements for new programming prior to January 1, 2006. Video programming that is exempt pursuant to paragraph (d) of this section that contains captions, except that video programming exempt pursuant to paragraph (d)(5) (late night hours exemption) of this section, can count towards compliance with the requirements for pre-rule programming.

(6) For purposes of paragraph (d)(11) of this section, captioning expenses include direct expenditures for captioning as well as allowable costs specifically allocated by a programming supplier through the price of the video programming to that video programming provider. To be an allowable allocated cost, a programming supplier may not allocate more than 100% of the costs of captioning to individual video programming providers. A programming supplier may allocate the captioning costs only once and may use any commercially reasonable allocation method;

(7) For purposes of paragraphs (d)(11) and (d)(12) of this section, annual gross revenues shall be calculated for each channel individually based on revenues received in the preceding calendar year from all sources related to the programming on that channel. Revenue for channels shared between network and local programming shall be separately calculated for network and for non-network programming, with neither the network nor the local video programming provider being required to spend more than 2% of its revenues for captioning. Thus, for example, compliance with respect to a network service distributed by a multichannel video service distributor, such as a cable operator, would be calculated based on the revenues received by the network itself (as would the related captioning expenditure). For local service providers such as broadcasters, advertising revenues from station-controlled inventory would be included. For cable operators providing local origination programming, the annual gross revenues received for each channel will be used to determine compliance. Evidence of compliance could include certification from the network supplier that the requirements of the test had been met. Multichannel video programming distributors, in calculating non-network revenues for a channel offered to subscribers as part of a multichannel package or tier, will not include a pro rata share of subscriber revenues, but will include all other revenues from the channel, including advertising and ancillary revenues. Revenues for channels supported by direct sales of products will include only the revenues from the product sales activity (e.g., sales commissions) and not the revenues from the actual products offered to subscribers. Evidence of compliance could include certification from the network supplier that the requirements of this test have been met.

(8) If two or more networks (or sources of programming) share a single channel, that channel shall be considered to be in compliance if each of the sources of video programming are in compliance where they are carried on a full time basis;

(9) Video programming distributors shall not be required to provide closed captioning for video programming that is by law not subject to their editorial control, including but not limited to the signals of television broadcast stations distributed pursuant to Sections 614 and 615 of the Communications Act or pursuant to the compulsory copyright licensing provisions of Sections 111 and 119 of the Copyright Act (Title 17 U.S.C. §§111 and 119); programming involving candidates for public office covered by Sections 315 and 312 of the Communications Act and associated policies; commercial leased access, public access, governmental and educational access programming carried pursuant to Sections 611 and 612 of the Communications Act; video programming distributed by direct broadcast satellite (DBS) services in compliance with the noncommercial programming requirement pursuant to Section 335(b)(3) of the Communications Act to the extent such video programming is exempt from the editorial control of the video programming provider; and video programming distributed by a common carrier or that is distributed on an open video system pursuant to Section 653 of the Communications Act by an entity other than the open video system operator. To the extent such video programming is not otherwise exempt from captioning, the entity that contracts for its distribution shall be required to comply with the closed captioning requirements of this section.

(f) Procedures for Exemptions Based on Undue Burden.

(1) A video programming provider, video programming producer or video programming owner may petition the Commission for a full or partial exemption from the closed captioning requirements. Exemptions may be granted, in whole or in part, for a channel of video programming, a category or type of video programming, an individual video service, a specific video program or a video programming provider upon a finding that the closed captioning requirements will result in an undue burden.

(2) A petition for an exemption must be supported by sufficient evidence to demonstrate that compliance with the requirements to closed caption video programming would cause an undue burden. The term "undue burden" means significant difficulty or expense. Factors to be considered when determining whether the requirements for closed captioning impose an undue burden include:

- (i) The nature and cost of the closed captions for the programming;
- (ii) The impact on the operation of the provider or program owner;
- (iii) The financial resources of the provider or program owner; and
- (iv) The type of operations of the provider or program owner.

(3) In addition to these factors, the petition shall describe any other factors the petitioner deems relevant to the Commission's final determination and any available alternatives that might constitute a reasonable substitute for the closed captioning requirements including, but not limited to, text or graphic display of the content of the audio portion of the programming. Undue burden shall be evaluated with regard to the individual outlet.

(4) An original and two (2) copies of a petition requesting an exemption based on the undue burden standard, and all subsequent pleadings, shall be filed in accordance with § 0.401(a) of this chapter.

(5) The Commission will place the petition on public notice.

(6) Any interested person may file comments or oppositions to the petition within 30 days of the public notice of the petition. Within 20 days of the close of the comment period, the petitioner may reply to any comments or oppositions filed.

(7) Comments or oppositions to the petition shall be served on the petitioner and shall include a certification that the petitioner was served with a copy. Replies to comments or oppositions shall be served on the commenting or opposing party and shall include a certification that the commenter was served with a copy.

(8) Upon a showing of good cause, the Commission may lengthen or shorten any comment period and waive or establish other procedural requirements.

(9) All petitions and responsive pleadings shall contain a detailed, full showing, supported by affidavit, of any facts or considerations relied on.

(10) The Commission may deny or approve, in whole or in part, a petition for an undue burden exemption from the closed captioning requirements.

(11) During the pendency of an undue burden determination, the video programming subject to the request for exemption shall be considered exempt from the closed captioning requirements.

(g) Complaint Procedures.

(1) No complaint concerning an alleged violation of the closed captioning requirements of this section shall be filed with the Commission unless such complaint is first sent to the video programming distributor responsible for delivery and exhibition of the video programming. A complaint must be in writing, must

state with specificity the alleged Commission rule violated and must include some evidence of the alleged rule violation. In the case of an alleged violation by a television broadcast station or other programming for which the video programming distributor is exempt from closed captioning responsibility pursuant to paragraph (e)(9) of this section, the complaint shall be sent directly to the station or owner of the programming. A video programming distributor receiving a complaint regarding such programming must forward the complaint within seven days of receipt to the programmer or send written instructions to the complainant on how to refile with the programmer.

(2) A complaint will not be considered if it is filed with the video programming distributor later than the end of the calendar quarter following the calendar quarter in which the alleged violation has occurred.

(3) The video programming distributor must respond in writing to a complaint no later than 45 days after the end of the calendar quarter in which the violation is alleged to have occurred or 45 days after receipt of a written complaint, whichever is later.

(4) If a video programming distributor fails to respond to a complaint or a dispute remains following the initial complaint resolution procedures, a complaint may be filed with the Commission within 30 days after the time allotted for the video programming distributor to respond has ended. An original and two (2) copies of the complaint, and all subsequent pleadings shall be filed in accordance with § 0.401(a) of this chapter. The complaint shall include evidence that demonstrates the alleged violation of the closed captioning requirements of this section and shall certify that a copy of the complaint and the supporting evidence was first directed to the video programming distributor. A copy of the complaint and any supporting documentation must be served on the video programming distributor.

(5) The video programming distributor shall have 15 days to respond to the complaint. In response to a complaint, a video programming distributor is obligated to provide the Commission with sufficient records and documentation to demonstrate that it is in compliance with the Commission's rules. The response to the complaint shall be served on the complainant.

(6) Certifications from programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, may be relied on to demonstrate compliance. Distributors will not be held responsible for situations where a program source falsely certifies that programming delivered to the distributor meets our captioning requirements if the distributor is unaware that the certification is false. Video programming providers may rely on the accuracy of certifications. Appropriate action may be taken with respect to deliberate falsifications.

(7) The Commission will review the complaint, including all supporting evidence, and determine whether a violation has occurred. The Commission shall, as needed, request additional information from the video programming provider.

(8) If the Commission finds that a violation has occurred, penalties may be imposed, including a requirement that the video programming distributor deliver video programming containing closed captioning in an amount exceeding that specified in paragraph (b) of this section in a future time period.

(h) Private Rights of Action Prohibited. Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

SEPARATE STATEMENT OF CHAIRMAN REED E. HUNDT

Re: MM Docket No. 95-176 In the Matter of Closed Captioning and Video Description of Video Programming; Implementation of Section 305 of the Telecommunications Act of 1996; Video Programming Accessibility

The Telecommunications Act of 1996 mandated higher quality telecommunications services and expanded access to the American public. One of the most important dimensions of this congressional intent is Section 713, that requires closed captioning as a means to expand video programming accessibility for people with hearing disabilities.

In fulfillment of the statute's intent, today's decision by the Commission will give people with hearing disabilities greater access -- to the news, entertainment, sports, and the other many benefits provided by television -- whether they receive TV by broadcast, cable, DBS, MMDS, OVS, or other multichannel video programming distributors.

Our rules will ensure that when a person with a hearing disability turns on the television set, he or she will have closed captioned programs available from morning to night, across the different channels of programming provided by a multichannel video programming provider. The majority of the Commission has set a pace for transition to an era in which most programs will be captioned that is slower than I would prefer. Nevertheless it is good news that we have set a schedule that will ultimately ensure that Americans with hearing disabilities will have access to important video services and programming.

The marketplace does not always generate a necessary and appropriate amount of the sort of benefits from the communications revolution that help preserve our unity as a nation, as a society, as a complex group of mutually involved citizens, as a fantastically varied and extended family of Americans. The benefits not necessarily produced by the pro-competitive doctrine this Commission justly has prided itself on during the last four years include, among other things, children's educational television, free time for political debate, communications connections in classrooms, and access to communications for people with disabilities. That these benefits be made available is thought by Congress, the Administration, and this Commission to be important not only for their direct constituencies but for all of us, on the theory stated long ago by John Donne -- never send to know for whom the bell tolls; it tolls for thee.

Closed captioning also demonstrates one of the remarkable facts about doing the right thing. The extent of the benefits can surprise. Closed captioning, it turns out, benefits not only people with hearing disabilities, but also children learning to read, people learning English as a second language, and even travellers in airports and exercisers in gyms who can see but not hear the television.

Closed captioning also proves that markets do wondrous things when they are jump-started by a modest governmental intervention. Even the existing first-generation governmental action related to closed captioning and decoders have helped encourage new technologies that in time will produce much cheaper and more sophisticated means of providing closed captioning than currently available. These new technologies make me

completely confident that the Commission in time can require that all television programs be closed captioned in light of the fact that such a requirement will be an insignificant economic burden relative to the benefits to a huge and varied audience.

Our decision today establishes several important principles. First, our rules set dates certain by which material must generally be closed captioned. New programming must be fully captioned within eight years of our rules, and benchmarks along the way ensure that the amount of captioning increases as we move toward the transition's end. At the same time, the "no backsliding" rule ensures that the amount of captioning stays at least at the level that the deaf and hearing-disabled community has come to expect. Our rules also require that older, or "pre-rule" programming be 75% captioned at the end of ten years. Intermediate benchmarks would have been a sound idea. However, even without them, our decision emphasizes that we fully expect to see an increase in the captioning of pre-rule programming as the transition moves forward. Furthermore, we will consider imposing benchmarks if such programming is not being captioned.

Second, we have taken steps to simplify the determination of whether an exemption is warranted due to economic burden. Our rule that an entity need not spend more than 2% of annual gross revenues on closed captioning assures that even entities that cannot assume the full captioning responsibility nevertheless do some captioning. And, as the price of captioning falls with the changes in the market and improved technology, that 2% of gross revenues will purchase more captioning. We exempt any provider that has annual gross revenues of less than \$3 million, because 2% of such revenues would be so low as to place a burden on the entity that would not be outweighed by the benefit to people with hearing disabilities.

Third, we take steps to ensure that programming that has been captioned continues to be shown with its captions. Our rules require that where a captioned program has not been reformatted, its captions must be shown. We refrain at this time from imposing a hard and fast requirement that captioned, reformatted programming must carry captions. (In my view, this is probably a mistake on our part, but it can be revisited). But we make clear that we expect that such previously captioned material will continue to be captioned. Our decision today emphasizes that if this result does not occur, the Commission will consider imposing rules to ensure accessibility.

Fourth, our decision provides for future review to ensure that our rules stay current with the changes that will surely occur in the marketplace -- in terms of technological ability, labor capacity, and provision of accessibility. We anticipate that the implementation of the statute will stimulate growth in the captioning field, and a concomitant drop in price. Review will allow our rules to keep pace with developments in the marketplace and in society. Review will allow us to consider a number of issues, such as whether the percentages of captioning requirements are set correctly, whether Electronic News Room is a reasonable alternative to real-time captioning, whether non-English language captioning should be required, whether our specific exemptions uphold the spirit of Congress' intent to maximize the accessibility of video programming, and whether our enforcement process is realistic and efficient. Our decision also commits us to initiating a proceeding to examine the captioning of vital emergency information, to ensure that this critical information is

accessible to persons with hearing disabilities.

As I indicated above, I would have preferred to have these rules be more aggressive in providing swifter accessibility to much more TV programming for our nation's 20 million persons with hearing disabilities. I have joined the vote today because, for the most part, the item heads in the right direction. But I think it important to note that, in my view, eight years is more than a reasonable amount of time for a transition to captioning of all kinds of programming. I would have imposed the same eight-year transition period on both new and older, "pre-rule" programming. I also would have set the first benchmark in the transition for new programming earlier. Furthermore, although 75% in ten years marks a step forward in increased access to older video programming for people with hearing disabilities, I believe the Commission should have gone further by requiring that programming that pre-dates our rules should, like new programming, be fully captioned in time. It is important to note that while we now set the percentage at 75%, our decision holds that a review during the transition period will permit us to consider whether 75 % is, in fact, the appropriate percentage or whether, as I believe, it should be higher.

I also believe that rather than exempting now, in this *Report and Order*, some specific categories of programming, we should have waited until later in the transition to determine whether such specific relief is necessary. I appreciate the concerns of those who fear that the cost of captioning might cause valued programming to be dropped. Such an unintended consequence must be avoided. However, our transition rules in fact avoid that result by permitting flexibility in setting captioning priorities. Therefore, many of these concerns will not arise ever or at any rate not until much later during the transition. Therefore the Commission simply does not know enough now to decide whether and what specific exemptions may be necessary. I also would have imposed a captioning requirement on advertising -- at least national asking -- in light of the evidence in the record suggesting this requirement is absolutely economically feasible.

Closed captioning will allow people with hearing disabilities to benefit fully from information and entertainment that television provides so amply, universally, and without charge. The significance of this rule to at least a tenth of our people cannot be exaggerated. We have to a large degree taken a step today of which we, and everyone in the television business, can be proud. If we should have done more today, then more can be done by future Commissions.

SEPARATE STATEMENT OF
COMMISSIONER RACHELLE B. CHONG

Re: *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Report and Order, MM Docket No. 95-176.*

There is an inherent tension in new Section 713 of the Communications Act,¹ which orders new closed captioning and video description requirements for video programming throughout the nation. While the statute mandates full accessibility for new programming and requires a "maximization" of accessibility of pre-rule programming, the statute also makes clear that undue economic burdens should not be imposed on program providers by these rules, and grants the Commission broad discretion to order exemptions. Balancing these competing directives was a difficult task, and while I generally feel that we ultimately achieved the right balance, I do have some residual concerns about our new rules.

Overall, I am pleased to support the decision because it will greatly increase the accessibility of video programming for the deaf community. As a result of today's decision, the amount and variety of closed captioned video programs will dramatically increase over time. This will have tremendous benefits for the members of the deaf community, who will enjoy a fuller television experience and more easily receive crucial news and information. As a result of our decision today, I am hopeful that closed captioning will become an integral part of the video production process.

In crafting our rules, we tried strike a reasonable balance between the benefits that will flow from more closed captioning and the statute's mandate that we not place an undue economic burden on program providers. In particular, I had concerns about whether the economic burdens associated with the captioning requirements might have an inadvertent, negative effect on the diversity of programming. Specifically, some types of very worthy new programming that richly contribute to the diversity of our programming have very fragile support systems, due to the fact that the programming only attracts a small audience, has little repeat value, or is filmed on a shoestring production budget. Such programs might include the airing of a local high school football game, a community parade, a foreign language film, a locally produced children's educational program, or a city council debate. I believe that several of the exemptions that we adopt today will help ensure that this programming will not be driven off the air by a well-intentioned captioning requirement. I do not believe that anyone, including the deaf community, would have benefitted if our captioning requirements resulted in the loss of such programming.

I was also concerned about the impact that our pre-rule programming requirements might have on program diversity. While encouraging us to "maximize" captioning of this

¹ 47 U.S.C. Section 713.

older programming, Congress also appeared concerned that pre-rule programming not be relegated to the dusty archives due to the cost of captioning.² As a practical matter, this older pre-rule programming is often relied upon by new cable networks, because such programs are relatively inexpensive and well-received by audiences. I am concerned that an overly stringent pre-rule programming captioning requirement may inadvertently have the effect of discouraging new cable networks whose business plan relied on this older programming. Although the captioning requirements we adopted for pre-rule programming provide more flexibility to programming providers than our rules for new programming, I remain concerned that our requirements may be too onerous. In particular, our requirement that 75% of pre-rule programming be captioned might be excessive. I believe that we ought to monitor the impact of this requirement carefully to ensure we are not overburdening pre-rule programming unduly.

When I stepped back from our final product, I became concerned that, in our attempt to address the many legitimate concerns raised by the commenters and to strike the balance mandated by Congress, the rules we adopt today may be complex and difficult to apply. They appear over-regulatory in an era of deregulation. I am pleased, however, that our staff has committed to working with the programming providers and the deaf community to help them understand and work with the rules. While the decision reflects a difficult compromise that may not fully please either the deaf community or programming providers, in the end, I believe it to be a fair compromise.

² See H.R. Rep. No. 204, 104th Cong., 1st Sess., at 114 (1995).